Case No. 14-55592

In the United States Court of Appeals
for the Ninth Circuit

SUSAN HOUSE,
Objector-Appellant,

v.

RICHARD M. HORN, an individual and as trustee of the Richard M. Horn Trust dated June 16, 2003, and MARIA GUREVICH, fka Mary Bordetsky, an individual, on behalf of themselves, and on behalf of the class of all others similarly situated,
Plaintiffs-Appellees;

BANK OF AMERICA, N.A., a national banking association,
Defendant-Appellee,

Appeal from the United States District Court
for the Southern District of California
D.C. No. 3:12-cv-01718-GPC-BLM
The Honorable Gonzalo P. Curiel, United States District Judge

DEFENDANT-APPELLEE BANK OF AMERICA, N.A.'S RESPONSE TO APPELLANT HOUSE'S MOTION FOR AN ORDER VACATING THE DISMISSAL OF THE APPEAL

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This court has dismissed Objector-Appellant Susan House's appeal for failing to pay timely her docketing fees. (Order Dismissing Appeal (May 13, 2014) [ECF No. 87].) Although she now moves to recall the mandate and reinstate her appeal, she does not acknowledge, let alone attempt to meet, the relevant legal standard of "extraordinary circumstances." For that reason alone, her motion must be denied. Even if the standard were "good cause" or "excusable neglect," as House wrongly contends, her motion must likewise be denied, because the excuses she provides—namely a calendaring error and that her attorney, Joseph Darrell Palmer, was busy preparing for trial—are insufficiently supported. Accordingly, Defendant-Appellee Bank of America, N.A. ("BANA") joins Plaintiffs-Appellees Richard M. Horn and Maria Gurevich in requesting that this court deny House's motion.

I. **ARGUMENT**

A. **Introduction**

This Court's dismissal of House's appeal for failure to prosecute and immediate issuance of the mandate was appropriate. House, a paralegal, is the sole objector to a multi-million dollar class action settlement affecting 124,163 monetary settlement class members and 96,426 injunctive settlement class members. (Order Granting Mot. for Final Approval of Class Action Settlement ¶ 12, 17 (Apr. 14, 2014) [ECF No. 79]; Decl. of Marcia B. McCall ¶¶ 7-8, 12-14 (Mar. 12, 2014) [ECF No. 72-10]; Decl. of Susan House in Support of Objection to Proposed Settlement ¶ 5 [ECF No. 65-1].) Although she filed objections before the district court (see Objection of Susan House to Proposed Settlement and Notice of Intent to Appear at Fairness Hr'g (Feb. 28, 2014) [ECF No. 65]), House has repeatedly failed to prosecute them. Specifically, she did not file a reply in the district court to the parties' arguments that her objections should be dismissed because she did not prove her class membership and her objections otherwise lacked merit. (See D.C. Docket [ECF Nos. 65-79].) She also did not attend, let alone appear, at the fairness hearing on the settlement before the district court. (Hr'g on Mot. for Final Approval of Class Action Settlement 2:22-3:14 (Apr. 11, 2014) [ECF No. 86].) And now she has not timely paid the appellate docketing fees despite having opportunities to do so, first, upon filing her notice of appeal and, then again, after this Court served her attorney with an order explicitly stating that the appeal would be dismissed if the fee were not paid within 21 days of the order. (See Am. Notice of Appeal (Apr. 14, 2014) [Docket Text ECF No. 82]; Order re: Filing Fee (Apr. 17, 2014) [ECF No. 85].)

B. House Does Not Even Attempt to Meet the Standard for Recalling a Mandate and Reinstating an Appeal

The U.S. Supreme Court has said that the power to recall a mandate "can be exercised only in extraordinary circumstances" and that the power "is one of last resort, to be held in reserve against, grave, unforeseen contingencies." Calderon v. Thompson, 523 U.S. 538, 549-50 (1998) (emphasis added); accord United States v. Milojevich, 113 F.3d 1243, 1243 (9th Cir. 1997) ("In general, courts exercise this power only in exceptional circumstances-when, for example, the court is convinced that recalling the mandate is the only way to avoid a manifest injustice."); see also United States Court of Appeals for the Ninth Circuit, General Orders ("General Orders") § 2.4 ("Motions to reinstate [an appeal dismissed for want of prosecution] shall be granted only upon a showing of extraordinary and compelling circumstances.").

House, however, does not even acknowledge this standard, let alone attempt to meet it. (See Mot. of Appellant Susan House for an Order Vacating the Dismissal of the Appeal ("Mot.") passim (May 13, 2014) [DktEntry: 6]; see also

Decl. by Joseph Darrell Palmer ("Palmer Decl.") passim (May 13, 2014) [DktEntry: 6].) Therefore, her motion must be summarily denied for this reason alone.

C. House's Excuses Are Insufficiently Supported and Therefore Do Not Even Establish "Good Cause" or "Excusable Neglect"

Ignoring the relevant legal standard, House argues that she has shown "good cause" or "excusable neglect" and therefore her appeal should be reinstated. (see Mot. at 2; Palmer Decl. ¶ 5). She has not.

House has offered two excuses for failing to timely pay the appellate docketing fee, namely a calendaring error and that her attorney was busy with trial preparation. (Mot. at ¶¶ 2, 5; Palmer Decl. ¶ 4.) Although "excusable neglect includes 'situations in which the failure to comply with a filing deadline is attributable to negligence,'" the "determination of whether neglect is 'excusable' is ultimately an equitable one, taking into account all the relevant circumstances surrounding the party's omission." Marx v. Loral Corp., 87 F.3d 1049, 1054 (9th Cir. 1996) (quoting and citing Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd., 507 U.S. 380, 394 (1993)). But fatally, House has not set forth any of the circumstances surrounding her purported excuses. That is, she has not elaborated whatsoever on how the calendaring error occurred or why her attorney's trial preparations caused her to miss the deadline for paying the docketing fees. (See Mot. passim; Palmer Decl. passim.) Because her excuses are thus insufficiently supported, they cannot establish "good cause" or "excusable neglect" as a matter of law. See Selph v. Council of the City of Los Angeles, 593 F.2d 881, 884 (9th Cir. 1979), overruled on other grounds in Andrade v. Attorney Gen. of State of Cal., 270 F.3d 743, 752 (9th Cir. 2001) ("The term excusable neglect 'is not meant to cover the usual excuse that the lawyer is too busy, which can be used, perhaps truthfully, in almost every case.'" (quoting Maryland Cas. Co. v. Conner, 382 F.2d 13, 16-17 (10th Cir. 1967))); Symbionics Inc. v. Orlieb, 432 Fed. App'x 216, 220

(4th Cir. 2011) (finding that appellant had failed to establish "excusable neglect," as nothing was "extraordinary or unusual about counsel's calendaring error that should relieve [appellant] of its duty to comply with the time limit of [appellate] Rule 4(a)(1)"); In re O.P.M. Leasing Servs., Inc., 769 F.2d 911, 917 (2d Cir. 1985) ("'[T]he burden of demonstrating excusability lies with the party seeking the extension and a mere concession of palpable oversight or administrative failure generally has been held to fall short of the necessary showing'" (quoting Moore's Federal Practice ¶ 204.13[1.-3] at 4-97-98 (2d ed. 1985))).

D. House Should Not Be Given Any Leniency

In dismissing House's appeal, the Ninth Circuit clerk immediately issued the mandate, which is typically done only in frivolous appeals, emergency situations, or when the losing litigant is engaging in dilatory tactics. See Circuit Rule 41-1 advisory committee note; General Orders § 4.6(a)-(b) ("Exceptional circumstances may include, but are not limited to, instances where it appears from the record that a petition for rehearing en banc, or petition for writ of certiorari would be legally frivolous, where the losing litigant is attempting to defeat a just result by interposing delaying tactics . . . .").

That procedure was proper here. House has repeatedly failed to prosecute her objections. (See supra Part I.A.) Her failure to do so is consistent with her and her attorney's actions in other cases in which they have objected to class action settlements and is reason alone to deny any further leniency or grace.

As to her attorney, Joseph Darrell Palmer, multiple courts have recognized that he has "been widely and repeatedly criticized as a serial, professional, or otherwise vexatious objector" and that he and his clients have filed objections in bad faith. Dennis v. Kellogg Co., No. 09-cv-1786, 2013 WL 6055326, at *4 n.2 (S.D. Cal. 2013) (citations omitted); In re Oil Spill, 295 F.R.D. 112, 159 n.40 (E.D.

La. 2013) (stating that "Mr. Palmer has been deemed a 'serial objector' by several courts" and citing a hearing during which Palmer admitted that "it was 'regrettable' that he had been found to have engaged in 'bad faith and vexatious conduct'"); In re Uponor, Inc., No. 11-MD-2247, 2012 WL 3984542, at *3 (D. Minn. Sept. 11, 2012) (finding that Mr. Palmer was covertly representing pro se clients who "evidenced bad faith and vexatious conduct" in large part because they were "not class members," stating that Palmer "is believed to be a serial objector to other class-action settlements," and concluding that Palmer's clients' objections "appear little more than dilatory tactics of questionable motivation"); Heekin v. Anthem, Inc., No. 1:05-cv-01908, 2013 WL 752637, at *3 (S.D. Ind. Feb. 27, 2013) (stating that "Mr. Palmer is likely a serial objector and other courts have recognized similar behavior," and finding Palmer's "behavior in bad faith and also potentially violative of local and ethical rules"); In re Hydroxycut Mktg. & Sales Practice Litig., Nos. 09md2087, 09cv1088, 2013 WL 5275618, at *5 (S.D. Cal. Sept. 17, 2013) (finding that Palmer's client failed to establish that "she is a member of the class who has standing to file an objection" and that Palmer's client's objections "were filed for the improper purpose of obtaining a cash settlement in exchange for withdrawing [her] objections").

As for House herself, this appeal represents at least the third time that she and Palmer have partnered in connection with a meritless objection. Like in this case, House's actions in prosecuting her objections in those cases were suspect. See Ralston v. Mortg. Investors Grp., Inc., No. 08-cv-00536, 2013 WL 5290240, at *3 (N.D. Cal. Sept. 19, 2013) (noting that House submitted an untimely objection "to class counsel, but not the Court" and then later withdrew it after class counsel contacted Palmer about the untimely objection); Final Judgment and Order of Dismissal With Prejudice, Lockett v. MoGreet, Inc., No. 13 CH 21352 (Cir. Ct. Ill. 2013) at ¶¶ 6, 19, *available at* http://www.lockettclassaction.com/ (finding that

House's objection to the class action settlement was "not a valid objection to the Settlement because it was not submitted by a member of the Settlement Class, nor was it filed with this Court by the deadline for objections as set forth in the Notice to the Settlement Class and the Court's Preliminary Approval Order," rejecting the "substance of the arguments made in the House Objection," and appointing a special prosecutor "to investigate alleged impropriety underlying the House Objection").

E. BANA Would Be Prejudiced Should House's Appeal Be Reinstated

Further weighing in favor of not granting House and Palmer any leniency is that BANA will incur additional expenses in administering the settlement should the court recall its mandate and reinstate House's appeal. Specifically, those administrative costs will include the claims administrator's costs for e-mail and phone support to class members, updating addresses and other information needed to remain in contact with class members, maintaining and updating the settlement website, and general management. Importantly, unless these costs are awardable as damages and costs under Federal Rule of Appellate Procedure 38 for a frivolous appeal, BANA will not be able to recover them if it prevails on appeal. See generally In re Magsafe Apple Power Adapter Litig., Nos. 12-15757, 12-15782, 2014 WL 1624493, at *1 (9th Cir. Apr. 24, 2014) (holding in the context of what a Federal Rule of Appellate Procedure 7 appeal bond may secure that recoverable costs on appeal under Federal Rule of Appellate Procedure 39 do not include expenses unless recoverable pursuant to a fee-shifting statute).

II. CONCLUSION

For these reasons and for the reasons set forth in Plaintiffs-Appellees' response, the Court should deny House's motion to recall the mandate and reinstate her appeal.

DATED: May 23, 2014

Respectfully submitted,

By: /s/ Peter B. Morrison

Peter B. Morrison

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C)(i), I certify that the attached opening brief is proportionately spaced using Microsoft Word, uses a Times New Roman typeface in 14 point font size, and, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), contains 1,886 words.

DATED: May 23, 2014

Respectfully submitted,

By: /s/ Peter B. Morrison

Peter B. Morrison
Attorney for Defendant-Appellee

9th Circuit Case Number: 14-55592

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document, entitled: Defendant-Appellee Bank of America, N.A.'s Response to Appellant House's Motion for an Order Vacating the Dismissal of the Appeal, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 23, 2014.

I certify that all participants in the case are registered CM/ECF users and that the service will be accomplished by the appellate CM/ECF system.

Executed on May 23, 2014, in Los Angeles, California.

/s/ Peter B. Morrison
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